No. 48787-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

DEENA SANDBERG,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR MASON COUNTY

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

Deena Sandberg's plea was invalid and this Court should reverse the trial court's denial of her motion to withdraw.

a. The plea was invalid because Ms. Sandberg did not understand the nature of the charge.

A trial court may accept an individual's guilty plea only where the record demonstrates she entered the plea intelligently, voluntarily, and with an understanding of the nature of the charge against her. *State v. A.N.J.*, 168 Wn.2d 91, 117, 225 P.3d 956 (2010); U.S. Const. amend XIV; Const. art. I, § 3; CrR 4.2(d). The State's claim, that Ms. Sandberg's signature on the plea form satisfied these criteria, ignores the remainder of the record that demonstrates Ms. Sandberg did not understand the elements of assault. Resp. Br. 22-25.

The State relies first on the fact that in the plea form defense counsel identified the elements of assault as having been provided "in the information," arguing this was sufficient because the record demonstrated Ms. Sandberg had received the information at arraignment. Resp. Br. at 22; CP 63. However, as explained in Ms. Sandberg's opening brief, defense counsel did not attest that he had reviewed the information with Ms. Sandberg, or otherwise informed her of the elements, when reviewing the change of plea form with her.

Op. Br. at 8; CP 23. The information was not attached to the plea form and, as the State acknowledged, the trial court did not indicate it had reviewed the information when accepting Ms. Sandberg's plea of guilt. RP 18-19; Resp. Br. at 18 ("the only contention supported by the record is that the trial court relied exclusively on Sandberg's statement of defendant on plea of guilty for the factual basis to support the guilty plea").

The State's reliance on *In re Pers. Restraint of Hews*, 108 Wn.2d 579, 741 P.2d 983 (1987), is misguided. Resp. Br. at 25. Our supreme court granted Mr. Hews' personal restraint petition in *In re Pers. Restraint of Hews*, 99 Wn.2d 80, 88-89, 660 P.2d 263 (1983) and, because the issue was raised in a personal restraint petition, remanded Mr. Hews' case for a hearing to allow him the opportunity to demonstrate actual prejudice. The court subsequently affirmed the trial court's ruling that Mr. Hews had failed to show actual prejudice. *Hews*, 109 Wn.2d at 579. In doing so, the court relied on the fact that defense counsel had reviewed the information with Mr. Hews and the information "sufficiently apprised Hews that an intent to kill was required." *Id.* at 595. Although Mr. Hews denied culpability, the court found he had failed to establish actual prejudice in the taking of his plea

"[i]n light of the strong testimony from competent counsel" that Mr. Hews had reviewed the amended information and discussed it with his attorney. *Id.* at 597.

Contrary to the State's claim, the facts here stand in stark contrast to those in *Hews.* Here, the information was not attached to the plea form and there was no evidence that defense counsel had reviewed the information with Ms. Sandberg when reviewing the plea form. Ms. Sandberg's signature on the plea form, which did not describe the specific elements of the charge, is not enough to demonstrate she understood the "nature of the charge" against her. CrR.4.2(d).

The State's second argument, that Ms. Sandberg's protests that she scratched the officer accidentally demonstrated she understood the element of intent, is also lacking support in the record. Resp. Br. at 25. When the trial court asked Ms. Sandberg if she understood "what conduct [she] did that the State alleges constitutes the crime of assault in the third degree," Ms. Sandberg replied, "[a]ssaulting the police officer – yeah" and then "[y]es, on accident," and finally "[n]ot on purpose, on accident I assaulted a…" RP 14; Op. Br. at 6.

Ms. Sandberg did not tell the court the State was alleging she assaulted the officer but that, in fact, it had been an accident. RP 14. Instead, the record indicates Ms. Sandberg believed that accidentally scratching an officer constituted third degree assault. RP 14. This demonstrates she did not understand the nature of the charge against her.

In addition, contrary to the State's assertion, Ms. Sandberg did not abandon her claim that she scratched the officer by accident in order to move forward with the plea. Resp. Br. at 25. She explained she had scratched the officer by accident and the trial court moved on to question her about the rights she was giving up. RP 14-15. At no point did the trial court address whether Ms. Sandberg understood the element of intent.

Finally, the State's claim that she understood the elements of the charge because Ms. Sandberg admitted she "assaulted" the officer and "assault" includes "the concept of knowing conduct," effectively asks this Court to eliminate the constitutional requirement that an individual enters a plea voluntarily and intelligently by understanding the nature of the charge against her. *A.N.J.*, 168 at 117. It is not enough that "assault" includes an element of intent. The record must demonstrate

the individual pleading guilty understood the element of intent is required to prove assault.

"A plea is not voluntary in the constitutional sense unless the defendant has adequate notice and understanding of the charges against him." *Hews*, 108 Wn.2d at 590 (citing *Henderson v. Morgan*, 426 U.S. 637, 645, n.3, 96 S.Ct. 2253, 49 L.Ed.2d 108 (1976)). When a plea is not voluntary, a manifest injustice has occurred, and the trial court must permit a defendant to withdraw her plea of guilt. CrR 4.2(f); *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 298, 88 P.3d 390 (2004) (citing *State v. Ross*, 129 Wn.2d 279, 916 P.2d 405 (1996)). Thus, the State's claim that no manifest injustice occurred here is meritless. Resp. Br. at 26.

Ms. Sandberg moved to withdraw her plea prior to sentencing, further lending credibility to her claim that she did not understand the consequences of her plea. *A.N.J.*, 168 Wn.2d at 107. This Court should find that the trial court accepted the plea in violation of Due Process and CrR 4.2 and reverse.

b. <u>The plea was invalid because Ms. Sandberg was misinformed of its consequences.</u>

An individual is entitled to withdraw her plea under CrR 4.2(f) where she was misinformed of a collateral consequence. *A.N.J.*, 168

Wn.2d at 116. Ms. Sandberg explained that, based on her conversations with her attorney, she understood the "first-time offender" waiver to prevent a felony conviction from appearing on her record. RP 56, CP 41, 22. The State claims that there are no facts to support this assertion. Resp. Br. at 29. However, defense counsel was equivocal in his statement to the court, indicating that he would not have "necessarily advised" Ms. Sandberg that a "first-time offender" disposition would remain on her record as a felony conviction. RP 22. Ms. Sandberg's assertion, combined with her counsel's ambiguous declaration to the court, demonstrates Ms. Sandberg was misinformed of this collateral consequence.

Finally, for the reasons expressed in Ms. Sandberg's opening brief, this Court should follow *State v. Knotek*, 136 Wn. App. 412 ,149 P.3d 676 (2006) (*review denied*, 16 Wn.2d 1013 (2007)) and find she was misadvised of the a direct consequence of her plea.

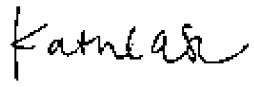
This Court should find her plea invalid and reverse.

B. CONCLUSION

For the reasons stated above and in her opening brief, this Court should reverse because Ms. Sandberg did not understand the nature of the charge and because she was misinformed of the consequences of her plea, either of which rendered her plea invalid.

DATED this 13th day of February, 2017.

Respectfully submitted,



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Appellant.	)	

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